123

(2)

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT PAUL MADDEN

Petitioner,

VS.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari
To the Arizona Court of Appeals

APPENDIX TO PETITON FOR WRIT OF CERTIORARI

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IN THE SUPERIOR COURT OF THE STATE OF

ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. ROBERT PAUL MADDEN Defendant	CR 2006-012521-001 DT 409 GJ 69 **INDICTMENT** **COUNT 1: AGGRAVATED ASSAULT, A CLASS 3 DANGEROUS FELONY (ROBERT PAUL MADDEN**

The Grand Jurors of Maricopa County, Arizona, accuse ROBERT PAUL MADDEN, on this 29th day of November, 2006, charging that in Maricopa County, Arizona:

COUNT 1:

ROBERT PAUL MADDEN, on or about the 4th day of August, 2006, using a rifle, a deadly weapon or dangerous instrument, intentionally placed JESSE MEJIA in reasonable apprehension of imminent physical injury, in violation of A.R.S. §§ 13-1203, 13-1204, 13-701, 13-702, 13-702.01, and 13-801.

The State of Arizona further alleges that the offense charged in this count is a dangerous felony because the offense involved the discharge, use, or threatening exhibition of a rifle, a deadly weapon or dangerous instrument and/or the intentional or knowing infliction of serious physical injury upon JESSE MEJIA, in violation of A.R.S. § 13-604(P).

s/ A True Bill

("A True Bill")

ANDREW P. THOMAS Date: November 29, 2006
MARICOPA COUNTY ATTORNEY

/s/
LISA LINDTEDT
DEPUTY COUNTY
ATTORNEY

/s/
BEVERLY FRANK
FOREPERSON OF THE
GRAN JURY

LL: smc/AO

ANDREW P. THOMAS
Michael K. Jeanes, Clerk
MARICOPA COUNTY ATTORNEY
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATEOFARIZONA, Plaintiff, vs. ROBERT PAUL MADDEN Defendant.	CR 2006-012521-001DT **STATE'S ALLEGATION OF AGGRAVATING CIRCUMSTANCES OTHER THAN PRIOR CONVICTIONS** (Assigned to the Honorable Margaret R. Mahoney)

The State of Arizona, by and through undersigned counsel, pursuant to A.R.S. § 13-702, A.R.S. § 13-702.01, and Rule 13.5, Arizona Rules of Criminal Procedure, amends the Indictment in CR2006-012521-001 DT to allege the following aggravating circumstances. Any additional aggravating circumstances will be alleged in a seasonable time after they become known to the state.

. The offense(s) involved the use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, specifically a gun.

. The offense(s) caused physical, emotional or financial harm to the victim or, if the victim died as a result of the conduct of the defendant, caused emotional or financial harm to the victim's immediate family.

. The offense(s) involved evidence that the defendant committed the crime out of malice toward a victim because of the victim's identity in a group: Race: Hispanic and/or National Origin: Mexican.

Finally, if the jury convicts the defendant of multiple felony counts that are not used to enhance the sentence under A.R.S. § 13-702.02 or the defendant has felony convictions that were not used to enhance the sentence under § 13-604, the state intends to allege the multiple convictions as an aggravating circumstance.

Respectfully submitted January __, 2007.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

By: /s/_____

/s/ Gregory Hazard
Deputy County Attorney
Copy mailed/delivered
January ___, 2007,
to:
The Honorable Margaret R. Mahoney
Judge of the Superior Court
Richard Randall
Public Defender
620 W. Jackson St., Ste. 4015
Phoenix, AZ 85003
Attorney For Defendant
BY: /s/_____
/s/ Gregory Hazard
Deputy County Attorney

GH/mmc

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Division 1
Court of Appeals
State of Arizona
Filed Jul. 24, 2008
Philip G. Urry, Clerk

STATE OF ARIZONA, Appellee, vs. ROBERT PAUL MADDEN, Appellant	1 CA-CR 07-0718 Department C **MEMORANDUM DECISION** (Not for Publication—Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-012521-001 DT

The Honorable Thomas Dunevant, III, Judge

Affirmed

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals Section
and Jonathan Bass, Assistant Attorney General
Attorneys for Appellee

Law Office of Jimmy Borunda Phoenix
by Jimmy Borunda
Attorneys for Appellant

PORTLEY, Judge.

1 Robert Paul Madden ("Defendant") appeals his conviction and sentence for disorderly conduct, a class six felony and dangerous offense.

FACTUAL AND PROCEDURAL BACKGROUND[1]

2 While on his regular delivery route for Meals on Wheels, J.M. entered a trailer park in August 2006. J.M. delivered meals to two senior citizens and began to exit the trailer park when he saw Defendant waving him down. Believing Defendant wanted information for Meals on Wheels, J.M. reversed his car and rolled down the window. Defendant yelled at J.M. to turn off his music and go back to Mexico. In response, J.M. told Defendant he would be back. Defendant then walked towards his trailer and returned to J.M.'s car

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[1] We review the facts in the light most favorable to sustaining the verdict. State v. Moody, 208 Ariz. 424, 435 n. 1, ¶2, 94 P.3d 1119, 1130 n. 1 (2004).

with a gun, threatening to shoot J.M. if he returned. J.M. left the trailer park and called the police.

3 Defendant was later indicted on one count of aggravated assault, a class three dangerous felony. The jury found Defendant guilty of the lesser-included offense of disorderly conduct and after unsuccessfully moving for a new trial, or in the alternative, a directed verdict, Defendant was sentenced to 1.5 years in prison with credit for forty-two days of presentence incarceration. Defendant appeals, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21 (2003), 13-4031 (2001) and 13-4033 (2001).

DISCUSSION

4 Defendant alleges error in the jury instructions, prosecutorial misconduct, error in denying his post-verdict motion, and improper sentencing.

I. Jury Instructions

¶5 Defendant challenges the final jury instructions. Defendant, however, did not object to the instructions, individually or collectively.[2] Because Defendant failed to object, he waived his right to challenge the instructions on appeal absent fundamental error. See State v. Henderson, 210 Ariz. 561, 567, ¶19, 115 P.3d

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[2] Defendant implies that he objected to the lesser-included offense instruction. While defendant informed the court that he would not be requesting the lesser-included offense instruction, he did not object when the trial court included the instruction pursuant to the State's request.

601, 607 (2005); Ariz. R. Crim. P. 21.3(c). To establish fundamental error, Defendant must demonstrate that error occurred, that it was fundamental, and that it caused him prejudice. Henderson, 210 Ariz. at 567, ¶20, 115 P.3d at 607. Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." Id. at ¶19 (internal quotation marks omitted).

A. Lesser-Included Offense Instruction

6 Defendant first contends that the jury should not have been instructed on the lesser-included offense of disorderly conduct. A lesser-included offense instruction is appropriate if the crime is a lesser-included offense to the one charged and the evidence supports the giving of the instruction. State v. Miranda, 200 Ariz. 67, 68, ¶2, 22 P.3d 506, 507 (2001).

7 Here, Defendant was charged with aggravated assault. The trial court instructed the jury on disorderly conduct. We have previously held that disorderly conduct under A.R.S. § 13-2904(A)(6) (2001) is a lesser-included offense of aggravated assault under A.R.S. § 13-1204(A)(2) (Supp. 2007).[3] State v. Miranda, 198 Ariz. 426, 429, §13, 10 P.3d 1213, 1216 (App. 2000), aff'd, 200 Ariz. 67, 22 P.3d 506 (2001).

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[3] We cite to the current version of the applicable statute because no revisions material to this decision have occurred.

B. Recklessness Instruction

We, therefore, look to see if the evidence supported the giving of the disorderly conduct instruction.

8 A person commits disorderly conduct if, with intent to disturb the peace or quiet of a person, or with knowledge of doing so, he recklessly handles, displays or discharges a deadly weapon. A.R.S. § 13-2904(A)(6). Defendant argues there was insufficient evidence to prove that he recklessly handled or displayed the rifle if the jury found that the rifle was not pointed at J.M. The jury heard all the evidence and rendered its verdict. The evidence included Defendant's statements that he was angry, was threatening, and had a loaded rifle. Regardless of whether the jury disbelieved J.M.'s testimony, however, we have found a defendant guilty on four counts of disorderly conduct when he removed a gun from his pocket, waved it in the direction of the victims, and began banging on and shaking the door. State v. Burdick, 211 Ariz. 583, 584, ¶ 3, 125 P.3d 1039, 1040 (App. 2005). In this case, while denying that he pointed the rifle at J.M., Defendant admitted that he told J.M. to go back to Mexico, approached him with a rifle, and threatened to shoot him if he returned. Like Burdick, the jury could have reasonably found that Defendant knowingly committed disorderly conduct without having found that Defendant directly pointed the gun at J.M. Because the evidence supports the giving of the disorderly conduct instruction, we find no error, much less fundamental error.

9 Defendant next contends that the trial court committed fundamental error by failing to instruct the jury on the recklessness element of disorderly conduct. We review jury instructions as a whole to determine whether they adequately reflect the law. State v. Gallegos, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). We will only reverse a conviction where the instructions, taken as a whole, may have misled the jury. State v. Johnson, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003).

10 The trial court correctly stated the elements of disorderly conduct under A.R.S. § 13-2904(A)(6). Defendant, however, faults the trial court for not sua sponte defining the element of recklessness. The trial court is not required to defined terms of ordinary significance. State v. Tyler, 149 Ariz. 312, 316, 718 P.2d 214, 218 (App. 1986). "Reckless" is defined as "marked by lack of proper caution: careless of consequences" or "negligent." Webster's Ninth New Collegiate Dictionary 983 (1990). Revised Arizona Jury Instructions ("RAJI") Standard Criminal 1.056(c) states "recklessly" is where the "defendant is aware of and consciously disregards a substantial and unjustifiable risk... [t]he risk must be such that disregarding it is a gross deviation from what a reasonable person would do in the situation." The common use of the term "reckless" is sufficiently similar to the RAJI definition. Because "reckless" is a term of ordinary significance, the court was not required to instruct the jurors on its definition.

11 Even assuming the trial court committed fundamental error by failing to give the recklessness instruction, Defendant was not prejudiced. In order to show prejudice, Defendant must show that absent

error, a reasonable jury could have reached a different result. See Henderson, 210 Ariz. at 569, ¶27, 115 P.3d at 609. Here, there was sufficient evidence for the jury to find that Defendant recklessly handled or displayed the rifle. Defendant admitted angrily threatening J.M. as he approached him with a loaded rifle. J.M. further testified that Defendant pointed the rifle at his head. Given the evidence, a reasonable jury could not have reached a different result even if the recklessness instruction had been given. Defendant, therefore, was not prejudiced by the trial court's failure to give a recklessness instruction.

II. Prosecutorial Misconduct

12 Defendant argues that the prosecutor committed prejudicial error in his closing argument. Specifically, Defendant alleges that the prosecutor misstated the facts when he claimed the Defendant "brandished" the gun and that Defendant admitted the gun was handled recklessly. Defendant further alleges that the prosecutor misstated the law by claiming that a crime was committed by merely bringing out the rifle. Because Defendant did not object to the prosecutor's closing argument, the allegation of prosecutorial misconduct is reviewed for fundamental error. See Henderson, 210 Ariz. at 567, ¶19, 115 P.3d at 607.

13 Once error is established,

> [t]o prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.

> Reversal on the basis of prosecutorial misconduct requires that the conduct be so pronounced and persistent that it permeates the entire atmosphere of the trial.

State v. Hughes, 193 Ariz. 72, 79, ¶26, 969 P.2d 1184, 1191 (1998) (internal quotation marks and citations omitted). A prosecutor, however, may argue all reasonable inferences from the evidence but may not make insinuations unsupported by the evidence. Id. at 85, ¶59, 969 P.2d at 1197.

14 The prosecutor's references were reasonable inferences drawn from the evidence. Defendant first challenges the prosecutor's use of the phrase "brandishing the gun." While Defendant claimed the rifle was pointed safely upward, J.M. testified that Defendant approached him angrily with the weapon and then pointed it at his head. The prosecutor's use of the word "brandishing" was supported by J.M.'s testimony. Defendant next argues that the prosecutor misled the jury by claiming he had admitted to handling the gun recklessly. Defendant admitted to angrily approaching J.M. with a loaded gun and making threats. The prosecutor could reasonably infer that Defendant's admissions satisfied the element of recklessness and essentially admitted guilt of disorderly conduct. Defendant finally claims that the prosecutor misstated the law by arguing that he was guilty of disorderly conduct by bringing out the gun without justification, even if it was pointed up. The record again contains testimony that Defendant was upset, approaching J.M. with a loaded weapon, and threatening to shoot him. The prosecutor could reasonably argue that these actions were sufficient to

disturb J.M.'s peace. The prosecutor's arguments were reasonable inferences from the evidence presented at trial. There was no error in the prosecutor's closing argument and, therefore, no prosecutorial misconduct.

III. Motion for New Trial

15 After the jury returned the guilty verdict, Defendant unsuccessfully filed a motion for new trial arguing the verdict was contrary to the weight of the evidence, the trial[4] court erred in instructing the jury, and he had not received a fair and impartial trial. Defendant argues the trial court erred in denying his motion. We review the denial of a motion for new trial for an abuse of discretion. State v. Spears, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996).

16 Defendant first contends there was "NO evidence of any reckless handling of a firearm." The testimony belies the argument. J.M. testified that Defendant pointed a rifle at his head. Defendant admitted to losing his temper, testified that his actions were threatening and that he should not have retrieved the weapon. The court did not abuse its discretion by finding there was substantial evidence to support the jury's verdict.

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[4] In the alternative, Defendant filed a renewed motion for acquittal pursuant to Arizona Rule of Criminal Procedure 20(b). Defendant, however, failed to move for acquittal at the close of the State's case. Because Defendant did not move for acquittal before the verdict, he cannot renew a motion for acquittal after the verdict was entered. Ariz. R. Crim. P. 20(b) ("A motion for judgment of acquittal made before verdict may be renewed by a defendant within 10 days after the verdict was entered.").

17 Defendant next contends that his motion for new trial should have been granted because the jury was improperly instructed on the lesser-included offense of disorderly conduct, the trial court failed to give a recklessness instruction, and the prosecutor's closing argument was improper. For the reasons stated above, we find no error. See ¶¶5-14. The trial court properly denied Defendant's motion for new trial.

IV. Sentencing

18 At the sentencing hearing, Defendant requested an exceptional mitigated sentence under A.R.S. §13-702.01 (Supp. 2007). The court found A.R.S. §13-702.01 did not apply because the offense was designated dangerous and sentenced Defendant under A.R.S. §13-604 (Supp. 2007). Defendant claims the trial court erred in refusing to consider the exceptional mitigated sentence. We disagree.

19 We review sentencing issues that involve statutory interpretation de novo. State v. Urquidez, 213 Ariz. 50, 53, ¶11, 138 P.3d 1177, 1180 (App. 2006). By its plain language, A.R.S. §13-604 supersedes other sentencing schemes. The statute provides that "[t]he penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if ... the dangerous nature of the felony is charged in the indictment or information and admitted or found by the trier of fact." A.R.S. §13-604(P). Here, the State alleged dangerousness in its indictment and the jury likewise found Defendant committed a dangerous offense. Upon a finding of dangerousness,

the court properly found that A.R.S. §13-702.01 did not apply and imposed a sentence under A.R.S. §13-604.

CONCLUSION

20 For the foregoing reasons, we affirm Defendant's conviction and sentence.

/s/_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/_____
Sheldon H. Weisberg, Judge

/s/_____
Donn Kessler, Judge

(Seal of Arizona Supreme Court)

SUPREME COURT

STATE OF ARIZONA

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RACHELLE M. RESNICK
Clerk of the Court

SUZANNE DBUNNIN
Chief Deputy Clerk

December 3, 2008

RE: STATE OF ARIZONA vs. ROBERT PAUL MADDEN

Arizona Supreme Court No. CR-08-0228-PR

Court of Appeals Division One No. 1 CA-CR 07-0718

Maricopa County Superior Court No. CR2006-012521-001 DT

GREETINGS:
The following action was taken by the Supreme Court of the State of Arizona on December 3, 2008, in regard to the above-referenced cause:

ORDERED: Motion to Suspend Rules = GRANTED.

FURTHER ORDERED: Petition for Review = DENIED.

A panel composed of Vice Chief Justice Berch, Justice Hurwitz, and Justice Bales participated in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 3rd day of December, 2008.

Rachelle M. Resnick, Clerk

TO:

Kent E. Cattani, Arizona Attorney General's Office
Jonathan Bass, Arizona Attorney General's Office, Tucson Office

Jimmy Borunda, Law Office of Jimmy Borunda
Robert Paul Madden, ADOC #220507, Arizona State Prison, Lewis—Administrative Office

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IN THE

SUPREME COURT

STATE OF ARIZONA

Division One
Court of Appeals
State of Arizona
Filed Aug. 07, 2008
Philip G. Urry, Clerk

	)	Court of Appeals
	)	Division One
STATE OF ARIZONA	)	No. 1 CA-CR 07-0718
	)	
Appellee,	)	Maricopa County
	)	Superior Court
vs.	)	No. CR2006-012521-001
	)	DT
ROBERT PAUL MADDEN,	)	
	)	
	)	
Appellant.	)	
	)	

PETITION FOR REVIEW

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ARIZONA COURT OF APPEALS
DIVISION ONE

	)	**No. 1 CA-CR 07-**
STATE OF ARIZONA	)	**0718**
	)	
	)	MARICOPA
Appellee,	)	COUNTY SUP. CT.
	)	NO. CR2006-
vs.	)	012521-001 DT
	)	
ROBERT PAUL MADDEN	)	**PETITION FOR REVIEW**
	)	
Appellant.	)	

I. Issues Decided By the Court of Appeals

First, there are no issues presented and not decided by the Court of Appeals. Second, we are not appealing the error of the Court of Appeals on sentencing, since it is now moot because the Appellant has finished serving his prison term. Below, however, are the important issues that were decided, which we respectfully request the Supreme Court to Review and Reverse:

1. Whether the Judge below erred in even submitting the lesser-included offense to the jury;

2. Whether the Judge below committed Fundamental Error in failing to instruct at all on the essential "recklessness" element of the crime;

3. Whether the prosecutor committed Prejudicial Error in his closing argument by mis-stating both the law and the facts.

II. Facts Material to Consideration of The Issues Presented For Review

In all due respect, the facts of this case were not at all developed at the trial in the manner depicted by the Court of Appeals in its Memorandum Decision. To get the "flavor" of this case, it may be necessary for the Supreme Court or its staff to read the detailed Statement of the Case and Statement of the Facts contained in Appellants' Opening Brief.

As pointed out therein—and NOT contested in the State's Response brief below—this case was at ALL times, prior to the close of the evidence, tried as an "all or nothing case" on the indicted charge of aggravated assault. Specifically, the charge (not believed by the jury) that Appellant pointed a gun at the victim's head.

Court of Appeals in the attached decision, there was NO effort by the prosecution—and thus no rebuttal by the appellant/defendant—to depict this matter as a reckless disturbing the peace case as the

final verdict ended up being. That is NONE—from the Opening Statement on—as pointed out in detail in our two briefs, portions of which are excerpted in the Appendix attached.

A reading of the citations to the record in our Opening brief make that crystal clear—and again this position was NOT contradicted ONE BIT by the State in its Response brief filed below. **It denies due process to put a man on trial for one scenario, and then after ALL testimony is in, SUDDENLY seek a conviction on a DIFFERENT (even if included) crime and scenario.** Please see *State v. Ontiveros*, 206 Ariz. 539, 81 P.3d 330 (2003), especially paragraphs 13 and 17; and State *v. Rutledge*, 197 Ariz. 389, 392, 4 P.3d 444, 447 (2000).

Indeed the sandbagging was so bad that defense counsel was not ready with either an Instruction or an argument on the ARS 13-2904(A)(6) crime which was submitted literally at the last minute when the Prosecutor realized (correctly) that he would lose the Agg Assault charge that was the only Indictment filed. Section 3 of the attached appendix, referring to cites in our Opening brief, illustrate the STRANGE proceedings below wherein the charge (13-2904(A)(6)) of which Appellant was convicted of was SUDDENLY submitted to the jury over the EXPLICIT OBJECTION of BOTH defense counsel and Defendant personally!!!

As we stated candidly in our briefs below, IF the jury had convicted on the Indicted charge, there would have been little ground for appeal. But all kinds of errors were committed by the Trial Court and Prosecutor when they decided after all the evidence was in to TURN the case into a charge of Reckless conduct.

The facts necessary to decide this case are simple; the ONLY relevant evidence was whether Defendant put the victim in imminent fear of injury by aiming a gun at him. Talk of reckless disturbing the peace was a RED HERRING here; NEITHER party tried the case even SLIGHTLY on that basis. So the State's desperate successful last-minute effort to draw on a whole different canvas was as HIGHLY prejudicial as can be imagined.

More specifically, there was ZERO evidence of waving or brandishing the gun around—NONE. It was EITHER pointed at the victim's head as he alone contended OR it was kept stationary—pointed straight up or down—as ALL the other testimony claimed. There is NO "third scenario" that could possibly justify a reckless disturbing verdict.

III. Reasons the Petition For Review Should Be Granted

Appellant appreciates that the Supreme Court grants few Petitions for Review and then only usually

when there is a conflict between the Appeals Courts or a matter of urgent statewide import. But your Cr. Rule 31.19(c)(3) explicitly permits you to do so "where important issues of law have been INCORRECTLY decided." (Emphasis ɔurs). This is such a case. Although not precedential, because it is not a published opinion, the Decision below flies in the face of CLEAR, BINDING Arizona law in at least two areas: (a) the requirement that trial court Judges must instruct juries sua sponste on ALL essential elements of a crime; and (b) that Prosecutors NOT mis-quote either the Law OR the Facts in their Closing Arguments if it misleads the jury. You have disbarred some recently for doing so.

A collateral reason for over-ruling the Court of Appeals here is that MOST of the cases they cite are either supporting our position, do not state what the Appeals Court cites them as stating or holding, or are irrelevant to the decision in this matter. As the Highest Court in this State, only the Supreme Court can remedy this erroneous decision, and it should do so in the interests of Justice and Fairness.

(A) The Lower Court Never Should Have Submitted The Included Offense To The Jury

The first mistake the Court of Appeals made is ruling that (per fn 2 of P. 3 of the slip opinion) defense counsel never objected to the submission of the 13-

2904(A)(6) instructions and verdict form to the jury. *Au contraire!* As pointed out above and as shown in Appendix 3 attached, from PP 10-12 of our Opening brief, BOTH defense counsel and Defendant personally OBJECTED vigorously. Indeed, although the Judge may have been incorrect, he literally said five times that it was Defendant's call as to whether the lesser-included offense would be submitted. Indeed, it appeared at THAT point that both the Judge and Prosecutor were trying to benevolently HELP Defendant possibly get a lesser-included verdict and thus a lower sentence by that extra submission; a statement by Prosecutor Mr. Hazard SO indicated. But the Defendant and defense counsel REPEATEDLY turned down the "offer." To FURTHER object thereafter would have been argumentative and superfluous—CLEARLY putting form over substance to so require. More seriously, the Court of Appeals FORGOT that the crime Defendant was convicted of has at least THREE separate elements—not two. There is no question that there WAS "substantial evidence" (the test, all agree) of two of those elements—disturbing the victim's peace and the involvement of a gun. But the State must ALSO prove that the gun was displayed RECKLESSLY. In light of the evidence discussed above and the wording of the definitional statute on "reckless" states of mind and the recommended RAJI Instruction on same, there is great doubt that there was "substantial evidence" of THAT element. Without

such, the lower court erred in submitting the 13-2904 charge to the jury.

The "evidence" cited by the Court of Appeals to sustain the 13-2904 submission is NOT "substantial" in light of the HIGH (not low) standard set forth in 13-105(9)(c). At most, the evidence cited by the Court of Appeals shows simple negligence in bringing out the gun when it was not necessary to do so and keeping it at his side. But the definitional statute on the required reckless state of mind
REQUIRES much more—it ONLY applies when a person "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur..." Further, such action and/or mental state must be "of such nature and degree that disregard of such risk constitutes a GROSS DEVIATION (emphasis ours) from the standard of conduct that a reasonable person would observe in the situation."

A reasonable person MIGHT indeed show force by merely SHOWING a weapon if he felt he was in danger, reasonably so or not. But it would be a "gross deviation" ONLY if he waved it around or otherwise put the "victim" in imminent danger of being accidentally or otherwise shot. It is CLEAR here from the implicit acquittal on the Agg Assault indicted charge that assuming Defendant did not point the gun at the victim but kept it by his side, there was absolutely NO "gross deviation" or other acts that would meet the statutory requirements.

The ONLY authority cited by the Court of Appeals was State v. Burdick, 211 Ariz. 583, 125 P.3d 1039 (App. 2005). But *Burdick* dealt almost exclusively with the issue of multiple punishments for the same event. There was NO discussion OR holding on the question of WHAT constitutes "substantial evidence" in a 13-2904(A)(6) case. Plus the FACTS there were MUCH more aggravated than herein. In Burdick, the Defendant (who did NOT object to the submission to the jury) removed a gun from his pocket, waved it in the direction of the victims and began banging on and shaking the door, quoting the Court of Appeals. That CERTAINLY was reckless behavior. Here, Defendant made threats only *IN FUTURO* and never brandished the gun about. Yet the Court of Appeals said—WITHOUT discussing the "recklessly" issue specifically—that the jury had a right to find Mr. Madden guilty of 13-2904(A)(6) "without having found that Defendant directly pointed the gun at J.M." This is CLEAR ERROR under Arizona law in light of our overall legislative policy on gun possession and the statutory definition of recklessness. Also please see ARS 13-101, subsections 2, 3 and 4, on the intent of the Arizona criminal code in situations of possibly innocent or privileged behaviors.

B. Both Lower Courts Erred In Not Giving Any Instruction Defining the "Reckless" State of Mind Required for Conviction

The strongest reason—by far—for the Supreme Court to reverse the Court of Appeals' decision was its incredible refusal to overturn the conviction based on the Trial Court's total failure to give ANY Jury Instruction on the issue of Recklessness—an ESSENTIAL element of the crime defendant was convicted of.

There is only ONE case in Arizona that has EVER allowed a conviction to stand in such a situation, and it was a case where the Court of Appeals found the omission **harmless beyond a reasonable doubt.** No such finding could be made here, and although the Court of Appeals hints at that as an excuse for its ruling, even its decision does not so find; and any such finding would be clearly erroneous anyway.

The Appeals Court incredibly never even cited the one case in question, *State v. Garland*, 157 Ariz. 246, 756 P.2d 343 (1988)—cited by BOTH sides in the briefs—perhaps because it would be IMPOSSIBLE to square *Garland* with the facts herein. Rather it cites only *State v. Tyler*, 149 Ariz. 312, 718 P.2d 214 (1985). But *Tyler* in NO WAY supports the ruling herein. In the first place, *Tyler* was primarily a case involving evidentiary questions. The only issue on Instructions

was WHAT instruction to give on the matter of control or possession of a gun. Indeed, the trial court in *Tyler* did EXACTLY what Defendant herein seeks—"gave an instruction which included the **statutory** definition of possession" (see Para. 6 of the *Tyler* opinion—emphasis ours). Even then the opinion was 2-1 with a strong dissent on the Instruction issue. But even the majority opinion said that "A defendant is entitled to an instruction reasonably supported by the evidence"—UNLESS "other instructions given adequately express the same idea." (Para. 7 of *Tyler*). Here, there were NO instructions given WHATSOEVER defining the ESSENTIAL element of "recklessness" of the 13-2904(A)(6) crime!!!

The Appeals Court also cites *State v. Johnson*, 205 Ariz. 413, 72 P.3d 343 (2003) for the concept that only where instructions mislead the jury does reversible error occur. But *Johnson* STRONGLY agrees with OUR position that it is Fundamental Error not to instruct on ALL elements of the crime. As to their cite of *State v. Gallegos*, 178 Ariz. 1, 870 P.2d 1097 (1994), that is irrelevant because unlike here, the jury instructions THERE adequately covered the theories of the case; helpful to US here is the *Gallegos* holding that prejudice stemming from unobjected-to error must be analyzed in light of the ENTIRE RECORD.

There are DOZENS of Arizona cases, many listed on PP 29-31 of our Opening Brief below, that

hold that ALL essential elements of any crimes submitted to the jury MUST be the subject of a jury instruction, sua sponte IF NECESSARY. The obvious reason is that otherwise the jury has to GUESS at the legal definition of essential elements of a crime or rely on television crime dramas or other extrinsic material in arriving at their verdict. Indeed, the Appeals Court incredibly SEEMS to sanction the jury going to a Webster's Dictionary to find out what "recklessness" means under Arizona law, per their discussion on P. 6 of the slip opinion. Rather than repeat here the long list of cases ignored by the Appeals Court, we will just cite the two cases listed in the *Tyler* dissent which points out that failure to instruct on the LAW relating to the FACTS of the case and matters vital to the rights of the defendant constitutes Fundamental Error. See *State v. Gamble*, 111 Ariz. 25, 523 P.2d 53, and *U.S. v. Wolfson*, 573 F.2d 216, 220 (5th Cir. 1978) which is even more in point, holding that a defendant is entitled to instructions which precisely and specifically, rather than merely generally, point to the theory of his defense.

The Court of Appeals herein justifies its incredible ruling on this point by claiming lack of prejudice to the Defendant on the theory that Arizona's definition of recklessness in the statute and RAIJ is just common knowledge! **NOT SO!** The Arizona statute and the RAJI instruction which paraphrases it, sets a high, definite standard for the REQUIRED mental state of "recklessness" for the

purposes of all criminal statutes in Arizona which don't have a different definition of the term. This includes the statute in question here—13-2904(A)(6). **Our statutory definition as discussed above, does NOT allow convictions for merely careless, negligent behavior marked by lack of caution, as defined by Webster and sanctioned by the Court of Appeals in this case.** The Court of Appeals erred grievously in declaring that the "common use of the term 'reckless' is sufficiently similar to the RAJI definition." Indeed the Appellant herein strongly suspects that the jury DID use the "common definition" set forth by the Appeals Court rather than the much higher standard REQUIRED by the Arizona legislature in 13-105. And then the Appeals Court COMPOUNDS its error by claiming that "a reasonable jury could not have reached a different result even if the recklessness instruction had been given." As stated above, the short answer to that nonsense is the French term—*"Au contraire."*

C. Prosecutorial Misconduct Clearly Did Occur herein in Closing Argument

Appellant will spend little space on this point because it is so factually intensive. The Appeals Court incredibly did not even reach the question of whether the conduct was SO prejudicial as to constitute Fundamental Error because it found no error at all! Nevertheless, the issues of both the reason there was error and why it was Fundamental per the opinions of

this Court was fully briefed by Appellant. Please see Sections 1 and 2 in the attached Appendix which cite to the portions of Appellant's briefs dealing with both the facts and the law underlying this prong. But we will briefly herein answer the contentions of the Court of Appeals' decision which claimed the Prosecutor's closing argument was appropriate both as to fact and law.

As to the Facts, Appellant claims that the Prosecutor lied to the jury that Defendant had admitted reckless handling of the gun and that in any event, he had "brandished" it about. For the reasons stated above in Section II of this Petition, the UNDISPUTED evidence is that neither is true. The gun was held stationary by the weight of the evidence (apparently agreed by the jury through its implicit acquittal on the Agg Assault charge). Or at worst was pointed at the victim's head **(an intentional act)**. As stated above, there was NO possible third scenario of the gun being brandished about recklessly! The Appellant made clear, per the citations in our briefs (see section 4 of the attached Appendix), that although he may have acted imprudently in hindsight, he did not believe he acted recklessly or otherwise in violation of a criminal law. So there were NO admissions of the 2904 offense that could REASONABLY be inferred by the Prosecutor from Mr. Madden's testimony. The Court's contentions otherwise at Para. 14 are unpersuasive—especially as to the alleged "admissions" which were in fact

exculpatory EXPLANATIONS and not "admissions" of criminal conduct.

As to the Law, our position on that was well briefed per the sections of our briefs listed in Section 2 of the attached Appendix. Three late cases cited by the Appeals Court that include prosecutorial-argument rulings support our position and not that of the State or the Appeals Court that cited them! The holdings of those cases agree with the ones we cited and the affirmances in two of them were based on different factual and evidentiary situations than in the instant case. Please see State v. Henderson, 210 Ariz. 561, 115 P.3d 601 (2005); *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004) and *State v. Hughes*, 193 Ariz. 72, (1998).

Specifically, the Court ignores the strongest mis-statement of the law by Prosecutor Hazard in his Closing Argument. Namely, that merely BRINGING out the gun in the presence of J.M. constituted a violation of -2904 "because there was no justification" for such action. As repeatedly pointed out in the briefs, an Ariz. resident needs NO "justification" to "bring out" or openly carry a gun, especially on his own (leased) property—UNLESS he endangers someone under the Endangerment statute, points it at them under the Agg Assault statute or displays it recklessly under the -2904 statute herein. Clearly, Prosecutor Hazard invited the jury to find Mr. Madden guilty for the admitted act of MERELY bringing out

the gun—a NON-crime. A more prejudicial statement cannot be imagined; such was Fundamental Error in that it probably contributed to or even proximately caused the unjust verdict rendered.

Conclusion

For all the reasons above, this Honorable Court should grant the Petition for Review and Reverse the conviction and the Decision of the Court of Appeals.

Respectfully Submitted this 7th day of August, 2008

/s/_____
Jimmy Borunda
Attorney for Appellant

ORIGINAL and seven copies of the foregoing
Filed this 7th day of August, 2008, in:

Clerk of the Arizona Court of Appeals
Division One
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Phoenix, Arizona 85007

Two (2) Copies of the foregoing were deposited
for mailing this 7th day of April, 2008, to:

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Received
Aug. 21,
2008
Clerk
Supreme
Court

IN THE

SUPREME COURT

STATE OF ARIZONA

	)	No. 1 CA-CR 07-0718
STATE OF ARIZONA	)	
	)	MARICOPA COUNTY
Appellee,	)	SUP. CT. NO. CR2006-
	)	012521-001 DT
vs.	)	
	)	**SUPPLEMENTAL**
	)	**FILING**
ROBERT PAUL MADDEN	)	**TO PETITION FOR**
	)	**REVIEW AND**
Appellant.	)	**MOTION**
_____	)	**TO SUSPEND RULES**

Comes Now the Appellant/Petitioner for Review ROBERT MADDEN, by and through his attorney undersigned, and pursuant to Cr. Rules 31.17(a), 31.19(j), 31.20, and Sup. Ct. Rule 26, asks leave of Court to file this supplemental authority/exhibit for the reasons stated herein. Basically, Petitioner is asking for leave of Court, by way of extension of time

and/or suspension of the Rules, to file an additional exhibit to his Petition for Review. Namely, an editorial from the Arizona Republic (August 19, 2008) on the recent acquittal of Chandler Police Sgt. Tom Lovejoy on animal cruelty charges.

The relevance of this, although immediately questionable, is obvious upon reflection. The main basis of the Petition for Review is the egregious action of the Court of Appeals in allowing Mr. Madden to be convicted on the basis of a WEBSTERS' DICTIONARY definition of "reckless" rather than the Legislature's statutory definition in ARS §13-105(9)(c). The editorial well points out the BIG (not marginal) difference between merely "careless" behavior, the standard adopted by the Court of Appeals herein, and "reckless" behavior—as required for conviction of BOTH by the animal-cruelty statute mentioned by the editorial and by the statute under which Mr. Madden was convicted, ARS §13-2904(A)(6). Therefore, this Honorable Court should consider the premises of this editorial in deciding whether to review the Court of Appeals decision in light of the clear confusion/misconception among the public and even lawyers and Judges over what constitutes reckless as opposed to merely careless conduct.

See Section III B of the Petition for Review previously filed.

Respectfully Submitted this 21st day of August, 2008

/s/_____

Jimmy Borunda

Attorney for Appellant
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Editorial from the Arizona Republic (August 19, 2008)

THE ISSUE: GETTING THE VERDICT RIGHT IN K-9 CASE

OFFICER WASN'T RECKLESS

Modifiers matter. An East Valley justice court judge ruled on Friday that Chandler police Sgt. Tom Lovejoy was negligent when he accidentally left Bandit, the Belgian Malinois police dog, to die in a hot car on Aug. 11, 2007.

Lovejoy was negligent, said Judge Sam Goodman. But he was not "recklessly negligent."

The distinction is crucial. We all are made human.

We all make mistakes, even, sometimes, mistakes that bear with them grievous consequences. Tom Lovejoy's negligence—forgetting to fetch a sleeping dog from the back seat of a car—was a terrible mistake brought on by overwork, sleep deprivation and family-life complications.

It was, in short, the common negligence that resulted from a hard-working man's complicated life. Lovejoy erred, but by no means were his actions "reckless."

Lovejoy has endured much in the year since his mistake led to the death of his partner in the Chandler Police Department's K-9 unit.

The heartbreak of losing Bandit, certainly, was the worst. But, also there was the opprobrium of animal lovers, some of whom lashed out at the officer cruelly. And—yes—the wall-to-wall media coverage must have been tough.

Lovejoy endured an internal investigation by his department, as well as the two-day suspension resulting from it. And his department removed him from the K-9 unit.

But, for some, the punishment didn't suffice. Lovejoy could not simply have been negligent that day. He had to be proved "recklessly" so.

So, the Maricopa County Sheriff's Office pressed its own investigation, prodded forward by a county sheriff, Joe Arpaio, who takes enormous joy at lording his animal-loving bona fides over mere mortals like Tom Lovejoy.

It must have been reckless. He must have acted criminally. It couldn't have been a simple mistake.

It would have been nice if Maricopa County Attorney Andrew Thomas had seen the smug political opportunism rifling through the sheriff's investigation of Lovejoy's supposed "recklessness." It would have been nice if he had seen the cruelty of it all and simply let the case drop. But no.

Modifiers matter. Tom Lovejoy made a mistake. He was negligent. But he was not "recklessly" so.

His pursuers, on the other hand, did not seek mere justice. They chased down Tom Lovejoy in the name of a cruel form of justice. Which, so modified, isn't real justice at all.

IN THE
SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA	)	Court of Appeals
	)	Division One
	)	No. 1 CA-CR 07-0718
	)	
Appellee,	)	Maricopa County Superior
	)	Court
vs.	)	No. CR2006-012521-001
	)	DT
ROBERT PAUL	)	
MADDEN,	)	**Division 1**
	)	**COURT OF APPEALS**
	)	**STATE OF ARIZONA**
	)	**PLED**
Appellant.	)	**Aug 07 2008**
	)	**PHILIP G. ORRY,**
	)	**CLERK**

APPENDIX TO PETITION FOR REVIEW

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"OB" hereinafter Opening Brief "RB" hereinafter Reply Brief

offense to the Instructions and the verdict forms!!! Although the Judge makes no reference to the Recklessness element of 13-2904(A)(6), and makes no plan to instruct on same, he DOES state that "Each Element of Disorderly Conduct" must be proved beyond a reasonable doubt for a conviction thereon.

The Judge then instructed the jury. At RT 38, for example, he defines virtually every term in the Aggravated Assault statute, but makes NO mention of the statutory definition of "recklessness." **And on P. 41, he lists the elements of the lesser-included offense, including the requirement it be done recklessly (RT 41, line 21), but at NO time gives ANY definition of reckless or recklessly to the jury.** Although defense counsel does not request a further instruction at that time, as stated below, failure to instruct on essential elements of a crime is NON-WAIVABLE FUNDAMENTAL ERROR.

The final facts necessary to decide this case come in the Closing Argument of Mr. Hazard, especially his final one, where he mis-states both the FACTS AND THE LAW relevant to the 2904(A)(6) offense. Although not believed to be decisive for appeal, Hazard starts out his misleading argument at RT 43 (and again at RT 45) by falsely alleging that Madden was "lying in wait" with the gun. That is not what the testimony shows, but unlike a murder case, that is not a key element other than to show the general improper arguments of Hazard. Madden made it clear why he took the gun out in the first place—to have it ready IF he needed it for self-defense since

Jesse did not leave the property following the dispute over loud music. As discussed below, such is perfectly legal in Arizona, even if sometimes imprudent as in this case.

But Hazard starts committing ERROR when he falsely states at RT 46 that Madden "brandishes that gun..." At least Hazard is fair when he admits that at most, Madden wanted to "scare" Jesse and "doesn't really intend to shoot him or injure him..." Serious legal error starts at RT 50 when Hazard says: "No justification to get a gun." As stated below, no justification is NEEDED in this State to merely "get" a gun out, if it is not brandished recklessly or pointed at someone. Then at the bottom of RT 50, he falsely quotes Madden as saying that he "used it (the gun) that day." As discussed above, Madden said exactly the opposite.

Again at RT 54, Hazard tells the jury: "And so Mr. Madden did not have a legal justification to get that gun on Aug. 4, 2006." WRONG—because as stated below, that is NOT the law on guns in Arizona—although it is in NYC and D.C. until the recent D.C. Circuit ruling on the 2nd Amendment. Later down on RT 54, Hazard again insists that Madden was guilty of "brandishing the gun" even if he didn't point it at Jesse as alleged in the trial (line 22). So in this first argument, although Hazard NEVER mentioned the 2904(A)(6) included offense, he was already misleading the jury on key facts and law relevant thereto, leading to Hazard's FINAL argument where he clearly committed reversible error in that regard.

Note that defense counsel was sandbagged by Hazard's failure to mention the 2904 reckless offense, so he did not deal with it at all in his Closing Argument. But in Hazard's Final Closing Argument starting at RT 69, he further misquoted both LAW and FACTS so as to get a 2904(A)(6) verdict to send Madden to prison even if the jury believed that Madden did not aim the gun at Jesse. Starting at RT 71, Hazard flat-out lies about Madden's testimony, stating at line 12: "Mr. Madden has absolutely admitted to disorderly conduct. He essentially confessed to those elements on the witness stand under oath." Then Hazard immediately flat-out misstates the law, saying: "even with the gun pointed up and not pointed at Mr. Mejia, and without any justification for doing so, he definitely disturbed the peace of Jesse Mejia, AND THAT'S A RECKLESS HANDLING OF THE FIREARM. BECAUSE THERE'S JUST NO LAWFUL REASON TO HAVE THE FIREARM OUT AT THAT POINT." (Emphasis supplied). As stated below, that is just NOT the law in Arizona, especially in light of ARS 13-105 (9)(c).

Hazard drives the point in again, starting at the bottom paragraph of RT 71. After claiming there is a "mountain of evidence" to convict on Aggravated Assault, Hazard falsely says: "he's definitely guilty of disorderly conduct by his own admissions, by his own admissions." Then at RT 72, he runs together the concepts of pointing the gun and "brandishing it," not noting that any brandishing must be RECKLESS under Arizona law to be a felony. He compounds his reversible, prejudicial error by stating that EVEN if the jury does not believe Jesse—and thus would not convict on Aggravated Assault, "Disorderly conduct is there because of Mr. Madden's own admissions." This

is thus the THIRD time he mis-quoted the alleged admissions of Madden to insure a conviction on the lesser felony.

SECTION TWO

properly instructed on the reckless element of the crime there, the conviction was reversed because it failed to instruct on ALL the required elements—as in this case. Another recent case to the same effect was *State v. Johnson*, 205 Ariz. 413, 72 P.3d 343 (2003). It held that the trial court must instruct on the law relating to the facts of the case when the matter is vital to a proper consideration of the evidence—even if not requested by the defense. Failure to do so constitutes fundamental error. In such a case, the trial court has allowed (as it did here) a jury to convict without finding ALL THE REQUIRED ELEMENTS of the crime. Cf. *State v. Petrak*, 198 Ariz. 260, 8 P.3d 1174 (2000). Another case requiring fundamental-error reversal for failure to instruct on the required mental state was the 9th Circuit case from Az. of *U.S. v. Paul*, 37 F.3d 496 (1994). It also held that the conviction on the lesser included offense constituted an implicit acquittal on the charged offense—meaning that if a new trial is ordered here, it can only be on the 13-2904 offense and not the original charge.

Argument III: The Prosecutor Committed Prejudicial Error In His Closing Argument By Mis-Stating Both The Law and The Facts.

Although prosecutors are allowed wide latitude in their arguments to the jury –being allowed to argue any reasonable inferences from the evidence—they are

NOT allowed to mis-state facts or law. In this case, Mr. Hazard did so, and it is clear that such was highly prejudicial; and such, along with the failure to instruct on Recklessness, was probably the proximate cause of the false jury verdict on 13-2904(A)(6).

We have recounted for this Court in detail the mis-statements of law and fact that occurred in the last portion of the Statement of Facts above. In short, Hazard mislead the jury by claiming Madden had ADMITTED that he had handled the gun recklessly when that clearly was not true. He also claimed that it was a crime for Madden MERELY TO BRING OUT the gun without "justification" even if it was always pointed safely up as Madden and Czap testified. As indicated above, that is NOT the law in Az.. There was NO evidence the gun was "brandished about" as Hazard claimed. Madden's "admissions" were only that in hindsight it was imprudent and unnecessary for him to have brought out the gun; he DENIED that he did anything illegal with it or acted recklessly with it.

Thus, Hazard's argument was prejudicial, unfair and arguably unethical. See headnote 84 in *State v. Walden*, 183 Ariz. 595, 905 P.2d 974 (1995), which held there must be SOME evidence for a prosecutor to argue inferences from. In *State v. Blackman*, 201 Ariz. 527, 38 P.3d 1192 (2002), it was held that prosecutorial misconduct like this CAN IN SOME CASES WARRANT REVERSAL if "it probably affected the outcome and denied the defendant his due process right to a fair trial." That is CLEARLY what happened here because Hazard converted Madden's mere poor judgment and mistake of fact in fearing an assault by Jesse into a crime NOT intended by the

legislature. See *In Re Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004), wherein a prosecutor was disbarred for, among other things, making false statements to the jury in closing arguments.

There are numerous other Arizona and other state's cases indicating that UN-OBJECTED-TO PROSECUTORIAL ARGUMENT CAN BE SO PREJUDICIAL as to require reversal on appeal. *State v. Brown*, 231 S.W.3d 268 (Mo. 2007), is typical. Holding that a conviction will be reversed for improper argument IF (as we claim here) it is established that the complained-of comments had a decisive effect on the jury's decision OR where the argument is plainly unwarranted. The Connecticut Supreme Court ruled in *State v. Stevenson*, 797 A.2d 1 (Conn. 2002), that while a prosecutor can argue forcefully, it must be fair and based upon the facts in evidence and reasonable inferences therefrom; closing argument can NOT be used to even suggest inferences from facts not in evidence or to allow the jury to SPECULATE upon matters not in their jurisdiction (as we contend happened here).

An Arizona case that shows why THIS case needs reversal although most do not was *State v. Duzan*, 176 Ariz. 463, 862 P.2d 223 (1993). There, the prosecutor ALSO gave the jury misleading statements on the elements of the offense, but there—unlike here—the prejudice was cured because the Judge gave a proper instruction on the element in question, which of course did NOT happen here! But note a Washington case, *State v. Smith*, 144 Wash.2d 665, 30 P.3d 1245 (2001), where it was held that in some cases prosecutorial misconduct can be so flagrant as to be

reversible even if a curative instruction was given.

Our Supreme Court well defined what prosecutorial (or other non-objected) errors may be fundamental and thus reversible in *State v. Thomas*, 130 Ariz. 432, 636 P.2d 1214 (1981). Among events that make an error reversible is where fundamental rights are taken from the Defendant so as to deny him a fair trial. A key factor is a balancing test. If there is strong evidence against a defendant, technical error will not reverse. But **"if, however, it appears that the error did contribute to or significantly affect the verdict, fundamental error was committed and reversal is mandated on due process grounds..."** Although the error here was quite different from the error in Thomas, the prejudicial effect here was as bad or worse than in Thomas. Cf. *State v. Branch*, 108 Ariz. 351, 498 P.2d 218 (1972).

The rules just stated also apply in federal habeas corpus. Mis-stating evidence, if prejudicial, can warrant federal intervention. See *Macias v. Makowski,* 291 F.3d 447 (2002). (Relief denied because in habeas cases, federal relief will not be granted when the Defendant is otherwise clearly guilty.)

ARGUMENT IV: The Judge Erred In Not Granting The Rule 20(b) Motion For Acquittal N.O.V.

The standard for reversing erroneous denials of Rule 20(b) motions is abuse of discretion. Here, a motion for Acquittal NOV under 20(b) was timely made as part of a conjoined alternative motion for a New Trial. Although the State

one of those cases where prejudicial argument lead to an unfair trial and verdict.

The case of State v. Bruggeman, 161 Ariz. 508, 779 P.2d 823 (App. 1989), was one of the cases where such relief was properly denied but only because unlike this case, both the jury instructions and the argument as a whole fairly explained the case to the jury. As stated above, the exact opposite occurred here. The final argument virtually invited the jury to convict on a non-existent crime—apparently the "crime" of merely bringing out a gun without a valid self-defense justification.

The recent State v. Prince case, 204 Ariz. 156, 61 P.3d 450 (2003), emphasized that "obviously, the jury must determine guilt or innocence based only on admitted evidence." The Court there found the Argument both substantially accurate and one which probably did not influence the jury; this situation is quite different HERE.

Ironically, most of the cases cited by the State, like State v. Hughes, 193 Ariz. 72, 969 P.2d 1184 (1998), support OUR position. In Hughes, the Prosecutor made "an improper appeal to fear which constituted misconduct; the cumulative effect of the Prosecutor's misconduct deprived Defendant of a fair trial." The same was true of another case in the State's brief, State v. Turrentine, 152 Ariz. 61, 730 P.2d 238 (App.1986). The Court there said that the test "is whether the remarks call to the attention of the jury matters that they would not be justified in considering in order to arrive at their verdict and whether the jury under the circumstances of the case was probably influenced by those remarks." That was

EXACTLY what happened here as explained in our first brief.

Still another case cited by the Appellee supports our position—State v. Comer, 165 Ariz. 413, 799 P.2d 333 (1990). In that case, there was error in mis-stating the evidence, but the conviction was upheld because of two factors NOT present in OUR case: (a) the Prosecutor corrected his mis-statement; and (b) guilt was overwhelming so any error was harmless and not prejudicial.

In its argument, the State baldly claims there was neither error nor prejudice in Mr. Hazard's clearly-misleading remarks. We will let the Court judge that based on citations to the record in our first brief. Appellee's para. 20 on P. 10 of its brief substantially mis-states the undisputed situation here. The Court is respectfully asked to read Mr. Hazard's remarks and our analysis of why they mis-state both the undisputed facts and the law in our first brief. The most egregious error, as stated twice now, was to invite the jury to find Mr. Madden guilty of reckless conduct

SECTION THREE

violent; (b) always honest and not a liar; and (c) not biased or bigoted against Hispanics and that he had helped Hispanics in the past progress in their jobs. See RT 233-261 for this testimony, which also included the statement of the trailer-park lady manager that Jesse had indeed been warned about loud music before, contrary to his sworn testimony earlier.

Perhaps the MOST important "Facts" relevant to this appeal are in the final 6/29 transcript. Jesse testified again in rebuttal—but only on irrelevant matters about a non-existent baseball bat and other "self-defense" type issues. As stated in the Statement of The Case, this really was NOT a "self-defense" defense and those self-defense type issues were only brought up by Madden to explain WHY he brought out his gun in the first place. Again, that was for EXPLANATION not JUSTIFICATION.

But the FATAL ERRORS in this case occurred right before the rebuttal when Counsel met with the Judge to settle Instructions and verdict forms. Key is RT 7 where Hazard made the amazing statement—out of the blue—that the 13-2904(A)(6) felony disorderly conduct lesser-included offense should be submitted to the jury, although he preceded that apparent request by saying "The State is not requesting any (lesser included instructions)." Following this statement, the Judge asked defense counsel if THEY wanted any lesser-included-offense instructions. Despite counsel saying "NO" very clearly on PP. 7 & 8, and the Judge reiterating that Defendant only wanted Aggravated Assault to go to the jury, the Judge insisted that a waiver be obtained PERSONALLY from Madden, which occurred on the record. On P. 8, the Judge THREE TIMES refers to Madden's "decision" against the lesser-included offense, implying strongly that it was Madden's call. Further on RT 9, the Judge AGAIN TWICE refers to Madden's "decision." (Emphasis ours). The Judge seems to strongly SUGGEST that Madden ask for a lesser-included because the penalty is so much less, but Madden STILL refuses.

Then all of a sudden, after unrelated discussion again on the baseball bat, at RT 11, Hazard flatly requests the lesser-included instruction, almost paternalistically, citing the disparity in the sentencing "to give the jury an opportunity to make a just outcome in this case." Then, without giving defense counsel any further opportunity to be heard, and without giving his reasoning, the Judge suddenly orders his staff to add the lesser-included offense to the Instructions and the verdict forms!!! Although the Judge makes no reference to the Recklessness element of 13-2904(A)(6), and makes no plan to instruct on same, he DOES state that "Each Element of Disorderly Conduct" must be proved beyond a reasonable doubt for a conviction thereon.

The Judge then instructed the jury. At RT 38, for example, he defines virtually every term in the Aggravated Assault statute, but makes NO mention of the statutory definition of "recklessness." And on P. 41, he lists the elements of the lesser-included offense, including the requirement it be done recklessly (RT 41, line 21), but at NO time gives ANY definition of reckless or recklessly to the jury. Although defense counsel does not request a further instruction at that time, as stated below, failure to instruct on essential elements of a crime is NON-WAIVABLE FUNDAMENTAL ERROR.

The final facts necessary to decide this case come in the Closing Argument of Mr. Hazard, especially his final one, where he mis-states both the FACTS AND THE LAW relevant to the 2904(A)(6) offense. Although not believed to be decisive for appeal, Hazard starts out his misleading argument at

RT 43 (and again at RT 45) by falsely alleging that Madden was "lying in wait" with the

SECTION FOUR

denying a motion for a New Trial and from a sentence on grounds it is illegal or excessive.

STATEMENT OF THE FACTS

The Defendant/Appellant (henceforth "Madden") was indicted by the Grand Jury on one Count of Aggravated Assault based on INTENTIONALLY putting the "victim"—hereinafter "Jesse"—in fear of imminent injury with a gun. At P.142-49 of the 6/26/07 Reporter Transcript (hereinafter referred to as "RT"), the Judge gave preliminary instructions to the jury, which included defining "Intentionally" and the other elements of the Indicted charge—but NOTHING was said about included offenses or about any crimes committed "Recklessly."

Referring to the 6/27 RT, the Prosecutor gave his Opening Statement at pp. 9-15. He claimed that a rifle was pointed at the victim's head "out of misplaced anger, blind bigotry, hatred and a sense of entitlement..." (at P. 10.) After allegedly making threats to shoot him (Jesse)– either then or later—the Prosecutor said Madden put down the gun. He further claimed that there will be testimony from the police officer that Madden admitted bringing out the gun, but denied aiming it at the victim, claiming it was pointed down at all times. Very importantly, Prosecutor Hazard concluded his O/S at P. 15 by alleging that Madden brandished the gun, threatened

Jesse and committed a hate crime and that such constituted "Aggravated Assault." NOTHING was said then about any "reckless acts" or disturbing the peace. Hazard spoke ONLY about proving an intentional aiming of the gun.

Defense counsel made his O/S at PP 16-22. He too treated the case as if it was SOLELY about whether Madden pointed the gun at Jesse's head. He denied racial slurs, denied the gun was ever aimed at Jesse, and attempted to explain that the gun was brought out because certain of Jesse's actions and words made Madden fear Jesse might be armed or threatening since Jesse didn't promptly leave following the dispute over Jesse's loud music. Counsel said Madden's testimony would be that the gun was not loaded, that any threats were in futuro and especially that "the rifle was always pointed straight to the sky." (RT 19). Counsel said other witnesses would testify that the gun was never pointed at Jesse's head and that Madden had good character and no bias against Mexicans. Similar to Hazard, defense counsel concluded by saying at P. 22: "There's only ONE issue in this case: Did Mr. Madden point the rifle at Mr. Mejia's head? That is the ONLY issue in this case. It is a very simple case." (Emphasis supplied).

The alleged victim (Jesse) testified starting at P. 24. He indicated he was on the premises at Madden's trailer court as part of a regular route to deliver "Meals on Wheels" to elderly shut-ins. He said that Madden waved him down after his deliveries and complained that his car music was much too loud. He claimed Madden made racial slurs and told him to go back to Mexico. He admitted that at one point he told Madden he was going to "come back" and "I know your

trailer number." Jesse testified at P. 35 that Madden then went to his trailer and got a rifle and that it was pointed down but that "for a few seconds...he pointed it towards my head." (RT 36). Contrary to Hazard's O/S, Jesse testified there was no present oral threat,but that Madden said "If you come back, I'll shoot you." At P. 37, Jesse said he meant by HIS oral threat to Madden "that I was going to come back with a gun and a PD." At NO time during his testimony did Jesse claim Madden waved the gun around RECKLESSLY or did anything with the gun except what is stated above.

On cross, Jesse maintained the same story, although he DENIED that his music was loud. At RT 56, Jesse confirmed his view that the rifle was always pointed down; there was no claim it was "brandished" or waved around as Hazard claimed in both his O/S and Closing Argument. At the same page, Jesse confirmed that Madden WAS ON HIS OWN PROPERTY AT ALL TIMES during the incident.

The only other major State witness, Officer Rico, testified at P. 62. He said Madden was cooperative and answered all his questions. At P. 70, Rico said Madden said he brought out the rifle and had it pointed down at all times. Rico said Madden said there were no racial slurs but more slurs on young people who had allegedly bothered elderly residents of the trailer park with loud music and bad driving for some time. Rico quoted Madden as saying he feared for his life based on Jesse's statements, actions with his car and lack of immediate leaving after the dispute over loud music—and that his only threat was precatory—that he would shoot Jesse IF he ever came back. (RT 73). Rico also testified that although no

independent witnesses came forward at the scene that neither did he or other officers interview any other residents as to what they may have seen. On cross at P. 82, Rico discussed the position of the gun and said NOTHING to indicate Madden had handled the gun recklessly. Indeed he quoted Madden as stating that "the only time you point a rifle at anyone is when you're going to shoot it." (RT 84.) Rico confirmed that Madden always DENIED pointing the gun at Jesse and that there was no bullet in the chamber of the gun. He also said there was no relevant follow-up investigation after that before the Indictment.

Mr. Madden testified for the defense starting at P. 127. He said he was 71 years old, had no prior criminal record and was physically infirm. He said he was a long-time military veteran, trained in the handling of numerous firearms. At P. 129, consistent with Rico, Madden said that one never points a weapon "unless you're going to fire it. That's ingrained." He also insisted that for safety reasons, you always carry a rifle pointed up—not down—and that that was the way he carried the rifle at all times during the incident with Jesse. At PP. 130 & 138-39 he made clear that not pointing the rifle down was not done because such might be reckless and endanger others, but rather because the gun might jam and be useless to the shooter. At P. 137, Madden denied any "threatening gestures" and said the gun "never left my side..." He denied any intent to frighten Jesse, and said he brought the gun out just in case he would need it for self-defense if Jesse pulled a weapon; since Jesse did not leave the property following the dispute over loud music. (see RT 148).

Contrary to Hazard's Closing Argument as discussed below, Madden said at the bottom of P. 139: "I didn't think a crime was committed because I didn't use the gun." It should be further noted that in a brief argument about self-defense with Counsel, the Judge at P. 142 AGAIN said that the State was required to prove that the Defendant "Intentionally" put Jesse in fear of imminent injury. During cross at RT 156-65, Madden declined Hazard's suggestions that he mishandled the gun at any time; the closest he came was admitting that he told Rico after the fact that he "should not have brought the weapon out" after realizing Jesse was delivering meals. But as stated below in the Argument, that was HARDLY an admission that it was RECKLESSLY handled or otherwise violated any Arizona law. Rather he agreed with Hazard that "hindsight is always 20/20..."

On re-direct at RT 170, Madden further clarified his actions and intentions by explaining that after he realized WHY Jesse was in the trailer park, he "realized that I didn't really need my weapon." Again, this was NOT an admission of ANY illegal or unprivileged conduct under Arizona law as discussed below. Also see Madden's comment at lines 10-14 at RT 183, in answer to a juror's question, that nothing illegal happened because "the weapon was only shown." The other key defense witness was the one independent eye-witness, Dennis Czap, who testified beginning at RT 189. Despite the usual efforts of the Prosecutor to claim he was a good friend of Madden and thus lying for him—or that he couldn't really see what happened—Czap's testimony was clear, believable and fully exculpatory of Madden. (See especially the top of RT 196 & 224). He also testified as a character witness for Madden on the

traits of honesty, peacefulness, and lack of bigotry toward Mexicans. Finally, he explained that he did not immediately approach the police to report what he saw because Madden was not arrested and the police left after questioning Madden, so he assumed initially the matter was not being pursued against Madden.

The remaining defense witnesses were four strong character witnesses—all of whom had known Madden for years or decades, and had served with him in the military or in heavy-duty union construction work. Most were Hispanic themselves, and all testified that Madden was (a) peaceful as opposed to being

for the jury did the State introduce this theory that the REAL offense might be 13-2904(A)(6). As stated repeatedly in our prior brief, this case was tried by ALL parties at ALL times as an "all or nothing case." That is, the SOLE material issue was whether Madden POINTED the gun at the "victim" or merely brought it out. Indeed, although self-defense was "raised," as explained in the Opening Brief there was NO serious self-defense claim; the "self-defense" testimony was more of an EXPLANATION by Madden as to the reason (mistake of fact) as to why he brought out the gun in the first place, not really a JUSTIFICATION. Indeed, as stated repeatedly, NO JUSTIFICATION was needed under Arizona law for the acts Mr. Madden admitted, contrary to the Prosecutor's jury argument.

The State first errs on P. 4 of its brief by claiming Defendant failed to object to this instruction. The cites above clearly show the contrary; not only did BOTH the Defendant AND his attorney separately object to the -2904 instruction, the Transcript indicated that FIVE times the Judge implied it was the Defendant's "decision" which was determinative. When the Judge suddenly ordered his staff to prepare a verdict-form and Instructions on -2904 anyway, he gave NO reason NOR opportunity for Defense Counsel to further object, per the cites in our Opening Brief. As for Rule 21.3 (C), the Comment after the rule makes it clear the rule is NOT intended "to change the Court's inherent duty to instruct the jury on fundamental principles of law or bar the raising of fundamental errors on appeal." (Citing State v. Bray, 106 Ariz. 185, 472 P.2d 54 (1970).

The State argues that just because there was some evidence that Mr. Madden committed Aggravated Assault by pointing the gun that such necessarily means there is also ENOUGH evidence for a 2904(A)(6) violation. NO case so holds. Under -2904(A)(6), there must be an intent to disturb the peace AND a RECKLESS display of a weapon in so doing. As discussed below, the Prosecutor improperly argued that MERELY bringing out the gun "without justification" necessarily constituted a -2904 violation. In light of that error and the Judge's FATAL Fundamental Error in failing to instruct on "recklessness" under ARS 13-105(9), the jury was thus allowed to convict Madden (AS THEY APPARENTLY DID) WITHOUT A SHOWING OF ALL THE NECESSARY ELEMENTS OF -2904 (A)(6). Recklessness is a HIGH standard in Arizona per the statute; it can NOT be presumed MERELY because a gun is somewhere in the picture. Indeed, as pointed out in the Opening Brief, under the State's concept of the law, any citizen walking down a street with holstered pistols could be sent to prison. But as unrealistic as it may be to permit such in the nation's 5th largest city, Arizona law clearly DOES permit such activity UNLESS the gun is used to put someone in fear of imminent harm or brandished about recklessly.

The same as a citizen walking around in public with a gun often intends to make sure no one even THINKS of assaulting him, that was CLEARLY Madden's intent in bringing out the gun here. Although he did not have a valid objectively-reasonable fear of being attacked, he WAS acting under a Mistake of Fact that the "victim" might plan to harm him since the "victim" failed to leave the trailer-park following the dispute over loud music. IF

(key word) the gun had gone off and especially if the victim was injured, THEN it might be reasonable for a jury to conclude that Madden acted recklessly—but not under the rather undisputed facts in THIS case. And the "threat" does not change the result—because the threat was clearly in futuro—that Mr. Madden might shoot the "victim" IF he returned in the future.

In short, IF Mr. Madden had pointed the gun at Mr. Mejia, he would be guilty of Aggravated Assault. If he had brandished it about instead of holding it